Testimony of Leon Jones, Principal Chief
And
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On S. 611, the Indian Federal Recognition Administrative Procedures Act of 1999

Presented to the Committee on Indian Affairs of the United States Senate
Washington, D.C.
May 24, 2000

Chairman Campbell, Vice Chairman Inouye, Distinguished Members of the Committee on Indian Affairs, my name is Leon Jones and I have the honor of serving as the Principal Chief of the Eastern Band of Cherokee Indians of North Carolina. I am accompanied today by Dan McCoy, the Chairman of our Tribal Council and by George Waters, a consultant in Washington, D.C. who has worked with us for many years.

It is truly an honor to appear before this Committee. Before I get into the substance of today's hearing, I want to thank the Committee Members, and particularly Senators Campbell and Inouye for the many years and countless hundreds of hours you have put into protecting the rights of this country's first citizens. We know that there are more glamorous issues that would get you more publicity, more power and even more votes back home than would ensuring this country lives up to its obligations to Indian tribes. We also know that there is nothing that will give you a greater sense of satisfaction than your efforts on behalf of the Indian people of this great country. To Senator Inouye in particular, who has chaired more hours of hearings on Indian issues than any one in the history of the United States Senate, I have always wanted to publicly read a quote from Felix Cohen that I am reminded of when I think of your career here. This is not the famous miner's canary analogy that we have heard before but is one that is particularly appropriate for you:

> If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who were never Indians and never expect to be Indians fight for the Indian cause of self-government, we are fighting for something that is not limited by accidents of race and creed and birth; we are fighting for what Las Casas, Vitoria and Pope Paul III called the integrity or salvation of our souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes which should carry us through many defeats.

I can not match the beauty of the words of the grandfather of Indian law, but I can and will

again say thanks to you both.

Recognizing Tribal Governments, not Indians

The issue of federal recognition of Indian tribes is one that has perplexed this Committee for many years and by now you know that there is not going to be a simple answer or easy bill to pass. However, it remains the absolute strongest conviction of the Eastern Band of Cherokee Indians that we must distinguish between two key issues that we think continue to cloud the landscape is this area. With all due respect, we believe that even the very title of S. 611 adds to the confusion. This bill is called "the Indian Federal Recognition Administrative Procedures Act of 1999" (emphasis added). In fact, Mr. Chairman, this legislation is not about procedures that will recognize individual Indians, it is about procedures that will recognize long-standing tribal governments and we urge the Committee to always keep this distinction foremost in your minds as you deal with this matter. Because the bills refer to the federal recognition of "Indian[s]," many members of congress may have the impression that it is somehow a reaffirmation of certain people's "Indianness" or some sort of affirmation of social standing. Perhaps members of congress would be more understanding of the concerns of federally recognized Indian tribes if the bill was given a title that more accurately reflected what it would in fact accomplish - for instance:

> *The Establishment of procedures to Award Sovereign Status to Descendant Groups of Indian People as Fully Functioning Units of Government Independent of State Authority.*

While such a title might be somewhat sensationalist (and would undoubtedly lead to the bill's prompt demise), it is not at all an exaggeration of what the legislation will accomplish. At the very least, we urge this Committee to refrain from using the phrase "Indian recognition" and instead begin to routinely use the phrase "Federal Tribal Recognition," terminology that we will use throughout the remainder of this testimony.

Let us make no mistake about what Federal Tribal Recognition of non-recognized groups of Indians means. Upon the award of federal recognition, an Indian tribe is empowered with significant authority that they could not previously exercise, and an official government-to-government, fiduciary trust relationship is established on the part of the United States for the tribe. Federally recognized tribes become sovereign units of tribal government. Sovereignty allows for self rule and control. Sovereign tribes have the authority (and responsibility) to establish their own police forces and Judiciaries, and to incarcerate those who have violated tribal law. They can tax both individuals and businesses on their reservation, they can and must establish membership criteria; they can contract with the United States to perform obligatory federal services; establish hunting and fishing seasons and regulations independent from state regulations; and they can be granted Treatment as a State (TAS) status under numerous federal environmental laws including the Clean Water Act and the Clean Air Act. And of course, the unfortunate reality of the day is that the sovereign right to conduct high-stakes gaming overshadows all of these other authorities in the minds of many. It is important to remember that these are not powers granted to the tribe by the United States but are powers inherent to Indian tribes as units of government that long preceded the existence of the Federal government or any

state. By awarding federal tribal recognition, the United States is agreeing that the entity in question is a long standing and historic tribe whose self-governing authority must be recognized and reaffirmed.

It is therefore critical to Indian tribes that federal tribal recognition of heretofore nonrecognized tribes be undertaken in a very deliberative and methodical fashion. If tribal recognition is attained via any sort of an inexact process, the very concept of a special and 'bal government-to-government relationship and of tribal sovereignty's demeaned unique tri I I I I I and diminished. There are already too many enemies of tribal governments out there who want us destroyed. We can not hand them any ammunition suggesting that our relationship with the United States is anything but solid and historical.

Current Petitioners for Federal Tribal Recognition

There are non-recognized Indian tribes in the United States that absolutely should have been previously recognized and through unfortunate historical twists of fate have not been (such as those tribes in California that signed treaties which were not subsequently ratified by the Senate in part due to the greed associated with the California Gold Rush). However, there are also many groups seeking recognition that by even the most liberal standards absolutely do not qualify as historic Indian tribes. The federal government is tasked with the difficult job of distinguishing between the "wannabes" and the legitimate groups. This is particularly problematic for the Eastern Band of Cherokee Indians, as a large number of the petitioning groups use the word "Cherokee" in their name. Below is the list of groups that have actually petitioned the Bureau of Indian Affairs for Federal Tribal Recognition who either use the word "Cherokee" in their name or who claim to be Cherokees:

The Amonsoquath Tribe of Cherokee of Missouri
The Cherokee Indians of Georgia
The Cherokee Indians of Hoke County, North Carolina
The Cherokee Indians of Robeson and Adjoining Counties of North Carolina
The Cherokee Nation of Alabama
The Cherokee Nation West - Southern Band of the Eastern Cherokee Indians of Missouri and Arkansas
The Cherokee-Powhattan Indian Association of North Carolina
The Cherokees of Jackson County, Alabama
The Cherokee of Southeast Alabama
The Chickamauga Cherokee Indian Nation of Arkansas and Missouri
The Etowah Cherokee Nation of Tennessee
The Georgia Tribe of Eastern Cherokees, Incorporated
The Langley Band of the Chickamogee Cherokee Indians of the Southeastern United States of Alabama
The Lost Cherokee of Arkansas and Missouri
The Northern Cherokee Nation of Old Louisiana Territory of Missouri

The Northern Cherokee Tribe of Indians of Missouri
The Old Settler Cherokee Nation of Arkansas
The Ozark Mountain Cherokee Tribe of Arkansas and Missouri
The Red Clay Inter-tribal Indian Band of Tennessee
The Sac River and White River Bands of the Chickamauga-Cherokee Nation of Arkansas and Missouri, Incorporated
The Southern Band of Eastern Cherokee Indians of Missouri and Arkansas
The Southeastern Cherokee Confederacy, Incorporated of Georgia
The Southeastern Indian Nation
The Tuscola United Cherokee Tribe of Florida
The Western Arkansas Cherokee Tribe
The Western Cherokee Nation of Arkansas and Missouri
The Wilderness Tribe of Missouri

And last but not least, our favorite:

The Northwest Cherokee Wolf Band of Oregon

This last group, apparently unfazed by the loss of thousands of their brothers and sisters on the Trail of Tears, decided that getting to Oklahoma was only a warm-up, so they evidently just kept walking all the way to Oregon!! What I have just read is the list of actual petitioners. When Wilma Mankiller was the Principal Chief of the Cherokee Nation of Oklahoma, she put together a list of groups numbering close to 200 that claimed to be Cherokee from all across the country. I am attaching that list for the record.

Equally troubling are the Hollywood Indian names that the Chiefs of these so-called tribes have given themselves: "Little Bear," "Red Falcon," "Pale Moon," "Black Wolf," "Straight Arrow," "Swift Coyote," "Shining Bear," "Walking Bear," "Silver Badger," “Falling Star," "White Eagle," "Morning Dove," etc., etc., etc.

There is not a month that goes by when I am not approached by someone who claims that their great grandmother was a Cherokee, if not a Cherokee Princess. When it is an individual, I usually just smile and say, "That's nice." If people want to relish having some Indian ancestry - imagined or otherwise - I am not going to lose sleep over it. What does cause me great concern is when we hear these claims of being a legitimate Cherokee Tribal government. We have had major problems with such a group in Georgia particularly after the Georgia State Legislature granted them state recognition. Last year, this group convinced so many people in suburban Atlanta that they would soon be opening a casino that Congressman Barr actually sponsored an amendment on the floor of the House of Representatives to prohibit the Secretary from implementing the long delayed gaming regulations that apply when states refuse to negotiate in good faith under IGRA.

Mr. Chairman, while this matter can get excessively scientific with fine points that only a genealogist could appreciate, it also has to make sense to the Indian people. In my state of North

Carolina we have well known groups seeking recognition that can not speak a single word of their claimed Indian language, that can not repeat to you a creation legend that is unique to their people, that have no dance, or song, or burial practice that is unique to their claimed tribe. Even if you found a one hundred year old member of their group, he or she could not speak to you in that tribe's language because it never existed. What is it that we are preserving in this case? What would this "tribe" do that would be unique or different from any small town government? These are not insignificant questions.

Retaining Existing Criteria

Obviously, the United States must have a process in place to deal with the many petitioners and it is unfortunate that they can not merely discard the ones that are obviously fraudulent. Without research, how are they going to make that distinction? We were involved from the very beginning in working with both the United South & Eastern Tribes (USET) and the National Congress of American Indians (NCAI) and the Bureau of Indian Affairs (BIA) in coming up with the present system. We believe that the United States must have very exacting criteria and we believe that petitioners should be required to produce evidence that clearly shows they have met that criteria. The present regulations ensure a process based on an adherence to academic, legal, historic, sociological, anthropological and genealogical principles. For that reason, we strongly support the provisions of S.611 that retain the existing criteria that the BIA has used since the Federal Acknowledgment Process (FAP) began in 1978. We also support the provisions of S.611 that use the year 1871 as an historic benchmark from which the petitioner must demonstrate origin. We are amazed that the House bill, H.R. 361, requires only a demonstration of existence since 1934. The year 1932 is hardly a proper benchmark for concepts like "historical" or "continuous" (as in "extending from the first sustained contact with Euro-Americans"). The criteria in S.61l are consistent with the original Cohen criteria and have withstood the test of time.

BAR Workload Realities and the Exaggeration of the so called "Backlog"

We doubt that many independent anthropologists or historians would argue with the results of what the Branch of Acknowledgment and Research (BAR) has done to date, i.e., those 15 groups that have been granted recognition deserved it and those 15 that have been denied it, clearly were not, and are not, historical tribal governments. The principal criticism that both the Congress and petitioners have had of the BAR is the fact that it is a very slow moving process. There are a total of 237 petitions that have been received since the BAR process was first implemented in 1978. The critics of BAR always point to this ever growing number and then state that if the BAR has been able to dispose of only 30 petitions thus far (actually 46 including those that have been resolved through other means), that it will take until the next century before they are through. What has always bothered us about this argument is that the vast majority of the so-called "petitions" for recognition are nothing more than letters of intent. Even the BAR's harshest critics would not want the BAR to make judgments on whether to award or deny federal tribal recognition to these groups because if they did, every single one would be denied as they have submitted no documentation on which to base the assertion of being a tribe. When letters of intent are submitted to the BIA they are given a number and those numbers are then factored into the total numbers of so called "pending petitions." Presently, out of the total of 237, there are 166

petitions that the BAR has correctly deemed "not ready for evaluation." Out of that 166, there are 103 that are letters of intent with no documentation, 47 that are still responding to the BAR's request for more information, and 10 that are no longer in touch with the BIA at all. Surely, the BAR can not be criticized for not having acted on these. The bottom line here is that there are only 25 completed petitions before the BAR that are either in the "active status" category (14) or are ready to placed in that category (11).

The valid question has been posed as to why it takes so long for the BAR to process 11 as petitions that are active. We believe there are three principal reasons. First and foremost, the BAR office is absurdly understaffed. They properly consider a research team needed to process a petition to include at least one historian, one anthropologist, one genealogist and a secretary. Presently, they don't have enough staff for even three full teams. The Administration and the Congress are, once again, nickel-and-diming an Indian program and then complaining about the results! What is noteworthy is that discussions in the 105th Congress with Congressional staff contemplated creating a federal Commission to deal with this issue and having that Commission staffed with at least 25 professionals. Depending on whether that number included secretaries, it could staff from six to eight research teams. If that is what is anticipated, we suggest giving the present BAR enough FTEs to have six to eight teams and we are quite sure you will see a radical increase in the number of petitions that are processed annually.

The second reason is takes so long is that the staff are extremely methodical in going over petitions and the petitions often contain thousands of pages of background material that cannot be quickly researched. We hope that the BAR will always be very methodical because if they were not the consequences would be very serious. An example of this is a previous BAR petitioner group calling itself the Mowa Choctaw of Alabama. This group, among other things, claimed to be descendants to the Choctaw Treaty of Dancing Rabbit Creek, which, understandably, greatly angered our good friend Phillip Martin from the Mississippi Band of Choctaw Indians. After six months of genealogical research, the BAR found that the Mowas' claims were astonishingly flawed. Almost all of the Indians the petitioners claimed as ancestors were in fact not their ancestors and people, who in fact were their ancestors, were not Indians. Only 40 of the 4,000 present day "enrolled" Mowa could show any descent from an Indian person. The Mowas were eventually denied recognition but had this extensive research not been undertaken, their fallacious claims would not have been discovered. Prior to this the Mowa had convinced their Congressman to introduce a bill for them awarding them legislative recognition whereby they are required to prove nothing at all. None of the bills that have provided legislative recognition have required any demonstration of meeting the well-accepted criteria.

An additional reason why the BAR process is becoming bogged down is through an ever-increasing number of legal proceedings and Freedom of Information Act (FOIA) requests which are taking hundreds of hours of staff time that could otherwise be spent researching petitions. We have been told that the BAR received over 80 FOIA requests in 1999 that involved the review of over 20,000 pieces of paper. We think this Committee should ask the BAR staff about these proceedings. An instructive discussion of some of these legal proceedings can be found on page 7052 of the Federal Register of February 11, 2000. There are also unusual situations over which the petitioners have more control than does the BAR. For instance, the

Shinnecock Tribe of New York was the fourth tribe to submit a letter of intent when they wrote to the BAR in 1978. Their petition has still not been processed. Why? Because for only reasons they can explain, the Shinnecock's waited 20 years until 1998 until they submitted documentation. We have heard that they were advised not to submit a completed petition during the era of the Reagan Administration. If true, we think they received some bad advice.

Sunsetting the FAP

Another provision in S.611 on which we concur is the idea of having an end date (in this case eight years) by which all entities desiring recognition must have submitted a petition. There must an end in site for this process and of course we are supposedly only dealing with long standing, historical, Indian tribes. The fact that there were 40 petitioners when this process started and that 197 groups have submitted petitions since 1978 is significant. It's also significant that there were 16 new tribal petitions submitted in 1999. Let's remember that when the BAR process was first implemented, the BIA instituted a "locator project" wherein, with the help of professional anthropologists, the Bureau contacted over 100 known non-recognized groups across the country and informed them of the new BAR process and told them how to petition. We are now seeing petitions from groups that no professional anthropologist has ever heard of and which were not even identified by the Task Force on Unrecognized Tribes of the American Indian Policy Review Commission. Anyone who thinks there is no connection between groups that have just petitioned for the first time in 1999 and the notoriety from Indian gambling is delusional. It is a fact that there are casino interests behind some of the petitioners. Does any one really think that the ten petitioners from the state of Connecticut - including three in the last three years - have nothing to with the gaming success enjoyed by the Mashantucket Pequots? So yes, there absolutely should be a sunset provision by which all petitions must be submitted. We are not sure why that should take another eight years.

A New Commission Would Politicize the FAP

Mr. Chairman, while we agree with the concept of a sunset on petitions and the life of the Commission, our thoughts on the idea of creating a new Federal commission are that if you like the National Indian Gaming Commission, you are going to love the Commission on Indian Recognition!! Basically, we think it is a bad idea with no sound justification. An argument made by the proponents of a new Federal Commission is the allegation that there is a built-in conflict of interest within the Interior Department, which causes a predisposition against granting federal tribal recognition to unrecognized groups. We have seen no evidence that the allegation is true, and in conversations with BAR staff, have confidentially asked them if they have been pressured from within (i.e., from the Office of Policy, Management and Budget, the Office of the Secretary, the Office of the Assistant Secretary or even from the OMB) to not recognize a petitioner. We have been told by BAR staff that no such pressure has ever been applied. The fact that the BAR granted tribal recognition to the San Juan Palutes over the strong objections of the Navajo Nation, the largest and most powerful tribe served by the BIA and one with significant influence over the Bureau, is a good indication that the FAP has far more integrity than its critics allege.

We also have a difficult time swallowing the argument that a federal commission will somehow create a less political environment than presently exists with BAR's professional staff. If we have a conservative President, the odds are that we will end up more conservative Commissioners. Conversely, a more liberal President will likely lead to more liberal Commissioners. Bringing the consent of the Senate into this process also ensures a more - not a less - politicized process. Look at the stalemated situation we have in the Senate today with nominations. Do we really want to bring federal tribal recognition into this morass? Do people truly believe that establishing a new Federal commission will expedite the processing of petitions? How many years did it take before the National Indian Gaming Commission was really in business? How long will it take to get the Commissioners appointed, to get the Commission staffed, to find offices, furniture, to promulgate regulations, etc. etc. My prediction is that the processing the petitions will be delayed by at least five years through the establishment of this Commission and again, for what? To ensure a less politicized process than is alleged to exist presently? As a response to the totally unfounded allegations (most often from those who cannot meet the criteria) that the BAR staff is everything from arbitrary and capricious to racist and anti-Indian? If the Congress dedicated the same amount of money that it will cost to set up and staff this Commission to a thoroughly and professionally staffed BAR and set a five year deadline for completion, you would get ten times the bang for the buck than you would by implementing Section 5 of S.611.

Complaints Against the BAR

We also find little merit in the criticisms of the BAR that they are dogmatic, entrenched and unwilling to change or accept input from experts and the Congress. In late 1991, the FAP office published in the Federal Register a series of revised regulations intended to respond to concerns about interpretation and administration of the review process. Public input was sought on these changes, including nine public meetings In various parts of the country. Sixty-one written comments were received on the proposed revisions, and many of these comments were heeded and incorporated into the revised regulations that were finalized on February 25, 1994. The comments received by the FAP office are most instructive. There is little question that the revised regulations clarified standards for acknowledgment (recognition), defined more clearly the standards of evidence, reduced the burden of proof for those demonstrating previous acknowledgment, and made various procedural and definitional improvements. William Sturtevant, editor of the Handbook of the North American Indian and an expert in the BAR process has commented that the changes made in 1994 have been very helpful and responsive to the needs of petitioners. More recently, on February 11, 2000, the BAR issued a new directive that is intended to free up more of the time of the professional staff of BAR and in so doing, enable them to process petitions more expeditiously. In the past, BAR staff have actually done substantial additional research to supplement a petitioner's research where there were deficiencies. Under this new directive, BAR staff will only research a petitioner's claim to the degree needed to verify and evaluate the materials presented. It is obviously a little early to determine what kind of impact this new directive will have but is most certainly will expedite work in processing petitions.

It is also noteworthy that the critics of the BAR tend to be representatives of petitioners that have not succeeded in the BAR. To the contrary, the Tribal Historian for the Mohegan Tribe of Connecticut - a successful petitioner - has written to the Indian Affairs Committee and stated, "During this final stage of the federal recognition process, the second team of new BAR staff was entirely supportive, completely

professional and very fair. We wish to commend BAR staff for their administrative handling of the resolution of this process." The same letter also states, "Throughout the course of these two [ANA] grants, the BAR maintained open lines of dialogic communication with the tribe."

An Alternative to Consider

Perhaps the Committee should examine the establishment of an advisory committee or outside panel to oversee the BAR office before you throw the baby out with the bath water. If you do create such an advisory committee, we strongly suggest that no one be allowed to sit on the committee that has a client seeking recognition before the BAR. We would also like to respectfully urge Chairman Campbell and Vice Chairman Inouye to invite the entire BAR professional staff to your office for an off-the-record rump session on what it is that they do. We are quite convinced that you will have a very different perspective of these people when you do hear directly from them, as opposed to only hearing from those who have much to gain by convincing you of the staff's ineptitude. Don't invite the Assistant Secretary or the Head of Tribal Government Service but just talk freely with the folks whose job it is to decipher truth from spin. I can assure you it will be a most educational experience.

Conclusion

The FAP or BAR is working better than both the conventional wisdom and those with axes to grind would have you believe. Fund it and staff it properly, and put some time pressure on both petitioners and BAR staff, and we'll be done with this chapter of the relationship between the federal government and the tribal governments that preceded it. Thank you.